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IN THE
SUPREME COURT OF THE UNITED STATES

WANDA ADAMS, LEO L. FLOYD, *et al.*,
Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Eleventh Circuit

BRIEF *AMICI CURIAE* OF AARP, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), AMERICAN JEWISH CONGRESS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), NATIONAL COUNCIL OF LA RAZA, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

LAURIE A. MCCANN
Counsel of Record
DANIEL B. KOHRMAN
THOMAS W. OSBORNE
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060
Counsel for *Amici Curiae*

45 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY 4

A. Since the ADEA and Title VII Share Common Purposes and Identical Substantive Provisions, They Should be Interpreted Similarly 5

B. The ADEA's Prohibition of Decisions "Because of Such Individual's Age" Condemns Unintentional As Well As Intentional Age Discrimination 6

C. The Civil Rights Act of 1991 Did Not Affect the Viability of Disparate Impact Claims Under the ADEA 7

II. THE ADEA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS 9

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs 10

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitary Discrimination 12

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers May Violate the ADEA 14

B. The Eleventh Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination 18

III. THE COURT HAS RECOGNIZED THAT DISPARATE IMPACT IS MORE EFFECTIVE THAN DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION 20

A. Stereotyping Is Often Unintentional 23

B. Disparate Impact is the Most Effective Tool for Policing Discrimination Based on Stereotypes 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Pages**

Adams v. Florida Power Corp.,
255 F.3d 1322 (11th Cir. 2001) ..... *passim*

Albermarle v. Moody,
422 U.S. 405 (1975) 25, 30

Alexander v. Choate,
469 U.S. 287 (1985) 20

Arnold v. U.S. Postal Serv.,
863 F.2d 994 (D.C. Cir. 1998) 5

Bissette v. Colonial Mortgage Corp.,
477 F.2d 1245 (D.C. Cir. 1973) 20

Brecht v. Abrahamson,
507 U.S. 619 (1993) 9

Camacho v. Sears Roebuck,
939 F. Supp. 113 (D.P.R. 1996) 9

Chevron USA v. Natural Resources Defense Council,
467 U.S. 837 (1984) 16

Connecticut v. Teal,
457 U.S. 440 (1982) 4, 26

DiBiase v. SmithKline Beecham Corp.,
48 F.3d 719 (3d) *cert. denied*, 516 U.S. 916 (1995) ... 28

Dilla v. West,
4 F. Supp. 2d 1130 (M.D. Ala. 1998), *aff'd per curiam*,
179 F.3d 1348 (11th Cir. 1999) 22

Dothard v. Rawlinson,
433 U.S. 321 (1977) 28

EEOC v. Francis W. Parker School,
41 F.3d 1073 (7th Cir. 1994), *cert. denied*,
515 U.S. 1142 (1995) 21, 23, 26

EEOC v. Governor Mifflin Sch. Dist.,
623 F. Supp. 734 (D.C. Pa. 1985) 5

EEOC v. Wyoming,
460 U.S. 226 (1983) 10, 11, 21

Ellis v. United Airlines, Inc.
73 F.3d 999 (10th Cir.)
cert. denied, 517 U.S. 1245 (1996) 6, 7, 8, 19, 21

FDA v. Brown & Williamson Tobacco Co.,
529 U.S. 120 (2000) 16

General Electric Co. v. Gilbert,
429 U.S. 125 (1976) 4

Girouard v. United States,
328 U.S. 61 (1946) 9

Greenwood Trust Co. v. Commonwealth of Mass.,
971 F.2d 818 (1st Cir. 1992),
cert. denied, 506 U.S. 1052 (1993) 5

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 4, 11, 19, 26, 30

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 10, 20, 21, 22

Ingersoll-Rand v. McClendon,
498 U.S. 133 (1990) 5

In re: Employment Discrimination Litigation Against the State of Alabama,
198 F.3d 1305 (11th Cir. 1999) 25

INS v. St. Cyr,
533 U.S. 289 (2001) 16

International Board of Teamsters v. United States,
431 U.S. 324 (1977) 25

Johnson v. Combs,
471 F.2d 84 (5th Cir. 1972) 6

Johnson v. Santa Clara Transp. Agency,
480 U.S. 616 (1987) 9

Lorillard v. Pons,
434 U.S. 575 (1978) 5

McKennon v. Nashville Banner Pub. Co.,
513 U.S. 352 (1995) 2, 6, 29, 30

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 5

Mullin v. Raytheon, Co.,
164 F.3d 696 (1st Cir.) *cert. denied*,
528 U.S. 811 (1999) 6, 21

NLRB v. Plasterers' Local Union No 79,
404 U.S. 116 (1971) 9

Northcross v. Memphis Bd. of Educ.,
412 U.S. 427 (1973) 5, 6

O'Connor v. Consolidated Coin Caterers Corp.,
517 U.S. 308 (1996) 2

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 5, 6

Oubre v. Entergy Operations, Inc.,
522 U.S. 422 (1998) 2

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 7

Reeves v. Sanderson Plumbing Prods. Inc.,
530 U.S. 133 (2000) 2

Samuels v. Dist. of Columbia,
650 F. Supp. 482 (D.D.C. 1986) 20

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988) 9

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 7

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 7, 20

STATUTES AND LEGISLATIVE HISTORY

Age Discrimination in Employment Act (ADEA),
29 U.S.C. § 621(a) 11
29 U.S.C. § 621(b) 11
29 U.S.C. § 623 20
29 U.S.C. § 623(a)(l) 6
29 U.S.C. § 623(a)(2) 4, 5
29 U.S.C. § 623(f)(1) 5

Civil Rights Act of 1991,
Pub. L. No. 102-166, 105 Stat. 1071 (1991) 8, 9

Title VII of the Civil Rights Act of 1964,
42 U.S.C. § 2000e(2)(a) 4, 7

Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Pub. Welfare, 90th Cong. (1967) 18

Impact of the Age Discrimination in Employment Act of 1967, Before the Subcomm. on Retirement Income and Employment, House Select Comm. on Aging,
94th Cong. 2d Sess. (1976) 17

Reorg. Plan No. 1 of 1978, 92 Stat. 3781,
43 Fed. Reg. 19807 (May 9, 1979) 16

U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) ..... *passim*

REGULATIONS AND ADVISORY OPINIONS

29 C.F.R. § 1607 16
29 C.F.R. § 1625.7(d) 16
29 C.F.R. § 860.103(f)(1) 15
29 C.F.R. § 860.103(f)(2) 15
29 C.F.R. § 860.104(b) 16
29 C.F.R. Part 860 (1968) 14

Charles T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (August 1, 1968) 17

Ben P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't. of Labor, ADEA Opinion Letter (October 9, 1968) 17

MISCELLANEOUS

Roberta Sue Alexander, "Comment: The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World," 25 DAYTON L. REV. 75 (1999) .. 27

Bruce J. Avolio & Gerald V. Barrett, "Effects of Age Stereotyping in a Simulated Interview," 2 PSYCHOLOGY AND AGING, March 1987 28

Marc Bendick, Jr., Lauren E. Brown, & Kennington Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers," 10(4) JOURNAL OF AGING & SOCIAL POLICY 5 (1999) 28

Marc Bendick, Jr., Charles W. Jackson, & J. Horacio Romero, "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," 8 (4) JOURNAL OF AGING & SOCIAL POLICY 25 (1996) .. 28

Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention," 503 THE ANNALS 138 (1989) 29

Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA (1975) 23, 24

Howard Eglit, "The Age Discrimination in Employment Act's Forgotten Affirmative Defense," 66 BOSTON LAW REV. 155 (1986) 24

Keith R. Fentonmiller, "Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims," 47 AM. U. L. REV. 1071 (1998) 7, 8, 15, 17, 22

Raymond F. Gregory, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE (2001) 27

Stan Hinden, *Forced to Retire Before You're Ready The Merge-and-Downsize Era's Layoffs Hit Older Workers Especially Hard*, WASH. POST, June 6, 1999 29

Steven J. Kamenshine, "The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229 (1990) 21, 22, 23, 26

Charles R. Lawrence, III, "Ego, and Equal Protection: Reckoning With Unconscious Racism," 39 STAN. L. REV. 317 (1987) 25, 27

J. Levin and W.C. Levin, AGEISM: PREJUDICE AND DISCRIMINATION AGAINST THE ELDERLY (1980) 27, 28

William C. Levin, "Age Stereotyping," 10(1) RESEARCH ON AGING 134 (March 1988) 28

Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within, 41 THE GERONTOLOGIST 578 (Oct. 2001) 24, 25, 26

Robert Manor & T. Shawn Taylor, *Age-Bias Complaints Up Sharply Older Workers' Higher Salaries are Big Targets for Employers*, Chicago Tribune, July 15, 2001 29

David Benjamin Oppenheimer, "Negligent Discrimination," 141 U. PENN L. REV. 899 (1993) 27

Erdman B. Palmore, Ageism: Negative and Positive (1999) 25

Charles W. Perdue & Michael B. Gurtman, "Evidence for the Automaticity of Ageism," 26 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199 (1990) 25, 26

Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change," 100 YALE L. J. 1731 (1991) 25

Benson Rosen & Thomas H. Jerdee, "The Nature of Job-Related Age Stereotypes," 59 JOURNAL OF APPLIED PSYCHOLOGY 511 (1976) ... 28

Benson Rosen & Thomas H. Jerdee, "Influence of Age Stereotypes on Managerial Decisions," 61 JOURNAL OF APPLIED PSYCHOLOGY 428 (1976) ... 28

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INTEREST OF *AMICI CURIAE*[1]

AARP is a nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's

[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amici curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes and their arbitrary discriminatory effects, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them.

This case is of utmost importance to AARP's members. More than 40 percent of AARP's members remain active in the work force. Most are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-633. The vigorous enforcement of the ADEA is of paramount importance for the millions of older workers who rely on the Act to deter and remedy invidious age bias in the work place. Since 1985, as part of its advocacy efforts, AARP has filed more than 200 *amicus curiae* briefs in this Court and in the federal district and appellate courts regarding the proper interpretation and application of the ADEA. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000); *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

This brief is also submitted on behalf of the American Association of University Professors (AAUP), the American Jewish Congress, the National Council of La Raza, the National Association For the Advancement of Colored People (NAACP), the National Partnership for Women & Families, and the National Women's Law Center, all of which support the rights of older workers to be free from employment discrimination, whether on grounds of race, gender, national origin, religion, or age. The statements of interest of these *amici* are included in the appendix to this brief.

Denying the disparate impact method of proving age discrimination to its victims will thwart the intent of Congress,

insulate from challenge discriminating conduct which Congress has deemed devastating to individuals, society, and the national economy, and undermine the core civil rights principle that workers should be judged based on their abilities rather than characteristics unrelated to their participation in the work force, such as age. Since the consequences of discrimination are equally devastating regardless of the employer's motivation or the protected status of the victim, older workers must be afforded the same rights and avenues for redress as those enjoyed by victims of other forms of employment discrimination.

Amici urge the Court to reject suggestions that age discrimination in the work place is so fundamentally different from other forms of employment discrimination that it can be adequately addressed by the disparate treatment theory alone. Holding that the ADEA encompasses both disparate treatment and disparate impact claims would be in complete harmony with the ADEA's congressional purpose as well as its legislative roots.

For these reasons, *Amici Curiae* respectfully submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

In order to fully implement the will of Congress expressed in the ADEA, older workers must have the right to pursue both disparate treatment and disparate impact claims. While the court below concluded that Congress limited ADEA claimants to the disparate treatment theory of proof, there is no persuasive evidence of such limits in either the text or legislative history of the ADEA. In light of the fact that this Court did not even articulate the disparate impact theory until four years *after* the enactment of the ADEA, the unavailability of the disparate impact method of proving age discrimination cannot be based on Congress' failure to mention "disparate impact" in either the text or legislative history of the ADEA.

Those courts that have restricted ADEA plaintiffs to the disparate treatment theory of proof have attributed to Congress

an intent to differentiate between ADEA claimants and Title VII claimants that is found nowhere in either statute. They have misapplied conventional tools of statutory construction. They have selectively misread the ADEA's legislative history, which, contrary to their conclusions, contains strong affirmative support for the disparate impact theory. And, they have failed to recognize how the function and purpose of the disparate impact theory, as articulated by this Court, is perfectly suited to policing what the Court has stated it considers to be the "essence" of age discrimination. These failures bolstered the erroneous conclusion that Congress did not intend the disparate impact theory to apply to the ADEA -- a result which Congress never contemplated.

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY.

Section (4)(a)(2) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This language is the mirror image of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e(2)(a): the only difference being that the ADEA substitutes the word "age" for the words "race, color, religion, sex, or national origin." In *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971), the Court cited § 703(a)(2) as the statutory foundation for its decision that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . ." 401 U.S. at 431. The Court has subsequently confirmed that the "adversely affect" language, that is identical to both Title VII and the ADEA, is the source of the disparate impact doctrine. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976).

In *Griggs*, the Court declared: "The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." 401 U.S. at 429 (emphasis added). Accordingly, "[i]f the existence of the disparate impact approach is apparent from the 'plain' language of Title VII, it must also be apparent from the plain language of [the] ADEA." *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 741 (D.C. Pa. 1985).

A. Since the ADEA and Title VII Share Common Purposes and Identical Substantive Provisions, They Should be Interpreted Similarly.

"The similarity in language [between § 623(a)(2) of the ADEA and § 703(a)(2) of Title VII] . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144-45 (1990); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993) ("It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way."). The doctrine of *in pari materia* is especially appropriate for the ADEA and Title VII given that the substantive prohibitions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). *See also Arnold v. U.S. Postal Serv.*, 863 F.2d 994, 1003 (D.C. Cir. 1998) (Garth, J., dissenting) ("That the ADEA's coverage and provisions are substantially similar to the provisions of Title VII is no accident. The similarity between these two statutes flows from the fact that the ADEA was modeled after Title VII, relying on much of Title VII's actual language for its content.").[2/]

[2/] One textual difference between the ADEA and Title VII that courts have relied on to deny the disparate impact theory to age discrimination victims is § 623(f)(1) of the ADEA. This provision provides that employers may make decisions based upon "reasonable factors other than age." The provision is fully consonant with the disparate impact method of proving

(continued...)

The conclusion that identical language in the ADEA and Title VII was intended to prohibit the same forms of discrimination is bolstered by the fact that in addition to "shar[ing] common substantive features," the ADEA and Title VII share "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). In *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, the Court reasoned that interpreting statutes with similar language *pari passu* is particularly appropriate when "the two provisions share a common *raison d'etre*." (citing *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972)).

B. The ADEA's Prohibition of Decisions "Because of Such Individual's Age" Condemns Unintentional As Well As Intentional Age Discrimination.

The ADEA's substantive prohibitions, which were based directly on those in Title VII, state in pertinent part, that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). In rejecting disparate impact analysis under the ADEA, the Tenth Circuit in *Ellis v. United Airlines, Inc.*, without citing any authority, declared that "[t]he most obvious reading of the clause, 'because of such individual's age,' is that it prohibits an employer from intentionally treating someone differently based on his or her age." 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996). *See also Mullin v. Raytheon, Co.*, 164 F.3d 696, 700 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999) ("A commonsense reading of ['because of such individual's age'] strongly suggests that the statute includes a requirement of intentional discrimination.").

[2/] (...continued)
age discrimination and in fact, mirrors disparate impact analysis. *Amici* fully agree with the arguments in the National Employment Lawyers Association's (NELA) *amicus curiae* brief that the RFOA provision supports a claim of disparate impact under the ADEA.

The problem with the Tenth Circuit's "obvious reading," and the First Circuit's "commonsense reading" of the statute, however, is that they are in direct conflict with this Court's construction of the identical language contained in Title VII, which likewise prohibits discrimination "because of" a protected characteristic. "The Supreme Court has repeatedly found the phrase 'because of' to permit disparate impact analysis, reasoning that the phrase codifies the requirement of a causal connection between the protected trait and the challenged employment practice." Keith R. Fentonmiller, "The Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims, 47 AM. U. L. REV. 1071, 1121 (1998). *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989) ("The persuasion burden [under disparate impact analysis] must remain with the plaintiff, for it is he who must prove that it was '*because of* such individual's race, color, [etc.],' that he was denied a desired employment opportunity.') (emphasis added) (quoting 42 U.S.C. § 2000e-2(a)).[3/] "The causal connection is required in every discrimination case, no matter what the method of proof." Fentonmiller, at 1121.

C. The Civil Rights Act of 1991 Did Not Affect the Viability of Disparate Impact Claims Under the ADEA.

In *Ellis v. United Airlines, Inc.*, one of the cases the court below found "persuasive," *Adams v. Florida Power Corp.*, 255

[3/] *Accord Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) (plurality opinion) (interpreting words "because of" contained in Title VII's prohibition against sex discrimination to encompass "indirect stumbling block[s] to employment opportunities." such as in disparate impact cases challenging facially-neutral tests or qualifications); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-92 (1988) (plurality opinion) (holding that "an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination," because "[i]n both circumstances, the employer's practices may be said to adversely affect [an individual's] status as an employee, *because of* such individual's [protected class]" (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis added).

F.3d 1322, 1326 (11th Cir. 2001), the Tenth Circuit concluded that in failing to add a parallel provision to the ADEA when it enacted the Civil Rights Act of 1991 (CRA),[4] Congress "signal[ed] its intent not to provide for a disparate impact cause of action under the ADEA." 73 F.3d at 1008. The CRA added a provision to Title VII to define the burden of proof in a disparate impact case. Congress' failure to codify disparate impact analysis in the ADEA when it enacted the CRA does not, however, evince an intent to limit the doctrine to Title VII. There is simply no evidence that the issue was ever considered. As fully explained in Fentonmiller, 47 AM. U. L. REV. at 1126-28, arguments to the contrary do not bear scrutiny in logic and are not supported by the legislative history of the CRA.

Prior to the enactment of the CRA, Title VII did not mention disparate impact. And as Fentonmiller points out:

> even as amended, Title VII fails to state explicitly that an employment practice resulting in unjustified disparate impact is unlawful; the CRA did not alter the prohibitory language section 703(a) of Title VII. . . . Thus, any application of the disparate impact theory under Title VII still must invoke the Supreme Court's long-standing construction of section 703(a) as prohibiting practices that are fair in form, but discriminatory in operation.

47 Am. U. L. Rev. at 1128.

If there is any inference to be drawn from Congress' actions or inactions in 1991, it is that the CRA's failure to define disparate impact and explicitly make it an unlawful employment practice demonstrates a strong congressional belief that disparate impact analysis already was encompassed by the prohibitory language which has been in the statute since 1964. *Id.* As previously explained, that language prohibits discrimination, whether proved through disparate treatment or

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[4] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

disparate impact analysis. Since the absence of the words "disparate impact" in Title VII prior to 1991 did not make disparate impact analysis any less legitimate under Title VII, the same should be true for the ADEA after 1991.

Legislative restraint provides another plausible explanation for the CRA's silence with regard to disparate impact analysis under the ADEA. Specifically, "[t]he 1991 amendments responded to several Supreme Court opinions which arguably hurt Title VII plaintiffs. There was no comparable judicial assault on the ADEA, as no court had ever found disparate impact analysis unavailable to ADEA plaintiffs." *Camacho v. Sears Roebuck*, 939 F. Supp. 113, 120 (D.P.R. 1996). In such circumstances, the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *NLRB v. Plasterers' Local Union No 79*, 404 U.S. 116, 129-30 (1971) quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."). *See also Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 629 (1987) (Scalia, J., dissenting) ("*any* reliance on congressional failure to act is necessarily a 'canard.'") (emphasis in original).

II. THE ADEA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS, INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS.

Despite the strong textual similarity between the ADEA and Title VII, courts questioning "disparate impact" as a valid theory under the ADEA have looked to its legislative history, and in particular, to a Report by U.S. Labor Secretary W.

Willard Wirtz,[9] on which Congress drew heavily in crafting the ADEA. *See, e.g., Adams v. Florida Power Corp.*, 255 F.3d at1325; *see also* Respondent's Brief in Opp. at 14 (asserting importance of Wirtz Report). *Accord Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Hazen Paper's analysis of legislative history concerning the disparate impact issue was necessarily limited, because only a disparate treatment claim was before the Court. *See* 507 U.S. at 610. However, no such explanation exists for the superficial analyses of the ADEA's legislative history in *Adams* and other appellate decisions squarely addressing the availability of the disparate impact theory. A fresh analysis by this Court is now warranted. Its conclusions should be harmonized with the diverse and powerful evidence supporting disparate impact claims under the ADEA, including Congress' determination to outlaw all age discrimination shown to be "arbitrary," whether in its intent or its effects.

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs.

In *EEOC v. Wyoming*, the Court recounted the ADEA's early legislative history, including unconsummated efforts to "ban discrimination on the basis of age as well as race, color, religion, sex, and national origin" in Title VII of the 1964 Civil

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[9] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) (hereinafter "Wirtz Report"), *reprinted* in Joint Appendix ("JA") at 350-416. The Wirtz Report was compiled after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act. Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

Rights Act. 460 U.S. 226, 229, 230-32 (1983).[9] The Wirtz Report, the principal document establishing Congress' purpose in enacting the ADEA, *id.* at 229-231, clearly recognized as arbitrary facially neutral policies and practices falling more harshly on older workers.

The Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress." *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"; these were endorsed by President Johnson and culminated in the 1967 law enacted by Congress. *Id.* at 230-32. For instance, the ADEA's preamble, 29 U.S.C. § 621(a), summarizes findings in the Wirtz Report on "individual and social costs of age discrimination." *Id.* at 231. Likewise, the ADEA's text paraphrases strategies endorsed in the Report: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

The ADEA's focus on banning "arbitrary" discrimination anticipates the articulation in *Griggs* of "disparate impact" as a method for the "removal of artificial, *arbitrary,* and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431 (emphasis added). The term "arbitrary discrimination" originated with Congress' directive to the Secretary requiring a report on age bias: ". . . The Secretary of Labor shall make a report to the Congress . . . containing the results of such study and shall include in such report such recommendations for legislation to prevent *arbitrary discrimination* in employment because of age as he determines advisable." JA 354. (emphasis added).

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[9] Efforts at the federal level "date back at least to the 1950s," *Id.* at 229 and n.2. In 1903 Colorado became the first state to adopt an age discrimination law applicable to employment; by 1965 twenty states and Puerto Rico had such laws. JA 374-75.

In the Wirtz Report "arbitrary discrimination" is identified as the "kind [of bias] which might be dealt with by a statute prohibiting discrimination in employment on the basis of age." JA 398. The Secretary also described "arbitrary discrimination" as the conduct most comparable to employment discrimination banned by the 1964 Civil Rights Act. Specifically, "arbitrary discrimination" was defined as the "non-employment" or "rejection" of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* 355 (emphasis in original). The Report discussed at length findings of a special study of express – *i.e.*, intentional – age limits in employment.[1/] However, the Report also condemned employer conduct with the same result – lesser opportunity for older workers – but involving unintentional discrimination.

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitary Discrimination.

Secretary Wirtz pinpointed the most serious danger to employment of older workers as "advancing science" and "changing technology." These, he explained, lead employers to adopt new job requirements difficult for older workers to meet; however, such criteria may be unrelated to actual job needs. JA 359-60. Thus, the Report described as unjust one of the precise job criteria held unlawful six years later in *Griggs* on a theory of disparate impact: a high school graduation requirement for new employees, unjustified in terms of applicants' ability to do the job, and falling more harshly on members of a protected group, some of whom were qualified by virtue of experience, but few of whom graduated high school. *Id* 359.

1/ The study looked at 500 firms in five cities in those states without age bias statutes in order to assess "the most obvious," but not the only serious kind of age discrimination in employment: "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." JA 364-65.

The logic of Wirtz' concern is clear: in a U.S. labor market where educational attainment was (and still is) growing rapidly among younger workers, older workers consistently will fall short. The Secretary therefore concluded, "[a]ny employment standard" based on educational attainment "will obviously work against the employment of many workers – unfairly, if despite his limited schooling, an older worker's years of experience have given him the relevant equivalent [qualifications]." JA 359. In similar fashion, the Wirtz Report addressed effects of "aptitude and other entrance tests" on older workers, concluding:

> there is no evidence that older workers' experiences are different from those of the population generally, except in one respect – the better showing of younger, better-educated workers on tests in which performance is affected by recency of education and testing experience.

Id. 387. Secretary Wirtz reasoned that some jobs require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... rose with age." *Id.* 388.

Even if Secretary Wirtz in 1965 did not identify the "disparate impact" method of proof that this Court recognized as a means to combat "arbitrary discrimination" in 1971, his Report clearly acknowledged that age-neutral job criteria could produce "arbitrary discrimination" against older workers even though such criteria might be founded simply on faith in "'progress,'" JA 358-59, rather than age-based animus. By describing such age-neutral bias as "arbitrary," the Report clearly supported it being banned in what became the ADEA.

The Wirtz Report also specifically found evidence of "arbitrary discrimination" in still other types of employment policies and practices involving unintentional bias against older workers. With regard to "Institutional Arrangements that Indirectly Restrict the Employment of Older Workers, " JA 389, the Report stated broad concern, about "arbitrary"

discrimination. In particular, Secretary Wirtz opined that "[t]he practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity." *Id.* Similarly, the Report observed with regard to employer benefit plans that:

> The extent to which the range of pension-plan induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

Id. 397.

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers May Violate the ADEA.

Secretary Wirtz took advantage of several opportunities to provide guidance for interpreting the ADEA. Following the ADEA's enactment, the Secretary supervised issuance of two sets of materials highly relevant to interpretation of the new law. First, the Department of Labor promulgated interpretative regulations, *see* 29 C.F.R. Part 860 (1968), within days after the ADEA went into effect. Second, in the months following the ADEA's enactment, the Department began issuing interpretive opinion letters. Both sources strongly reaffirmed language in the Report to the effect that the ADEA was intended to ban age-neutral, non-job-related, employment practices with adverse disparate impact on older workers.

The regulations required, *inter alia*, with regard to physical requirements: (a) that age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) that a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c)

that pre-employment physical examinations distinguish between the physical demands of various jobs.[8/] In addition, the regulations provided that age-neutral employment evaluation criteria like quantity of output, quality of production, or educational level had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2).[9/]

The regulations also clarified an important aspect of the Wirtz Report. In the Secretary's discussion of express age limits, he noted that

> [a] significant proportion [are] arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.

JA 368. The Report enumerated nine such employer "defenses" of age limits, eight of which (other than "Desired age balance in the work force") have no direct connection to age. *Id.* 369. Thus, the regulations confirm, as suggested in the Report, that even after the enactment of the ADEA, most age

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8/ These provisions, 29 CFR § 860.103(f)(1)-(2), "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Fentonmiller, 47 AM. U. L. REV. at 1104 and 195, 196 (quoting WR at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" to Congress in June 1965 along with and in support of the Report. *See* JA 352.

9/ In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, 47 AM.U. L. REV. at 1104-05 and nn. 198-200 (quoting Research Materials at 81, and citing *id.* at 14, Wirtz Report at 3 [JA 358-60].

limits made unlawful by the Act could be defended on age-neutral grounds, thus raising the issue how to assure that the "arbitrary discrimination" many of them represented could be challenged. The regulations did *not* answer this question by directing attention to the intentional discrimination such neutral rules might mask, consistent with the later-developed "disparate treatment" method of proof. Rather, the regulations identified guidelines for identifying which neutral rules with adverse impact on older workers are justified by employer needs, consistent with the later-developed "disparate impact" theory of proof.[10/] The EEOC's current ADEA regulations are to the same effect, as Judge Barkett recognized in her *Adams* concurrence. That is, they recognize that the "reasonable factors other than age" defense "works in tandem with the business necessity defense in the disparate impact analysis." 255 F.3d at 1328.[11/]

These regulations are entitled to substantial deference in interpreting the ADEA's text, to the extent the Court decides that language employing traditional methods of statutory construction is ambiguous authorized. *Chevron USA v. Natural Resources Def. Council*, 467 U.S. 837, 843 n.9 (1984). *See INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290 n.45 (2001); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132 (2000) (where an agency responsible for administering a statute

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[10/] The same can be said of the regulations as revised in early 1969 to clarify, for example, that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable." 29 C.F.R. § 860.104(b) (1969).

[11/] Congress reassigned responsibility for administering the ADEA from the Department of Labor to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (May 9, 1979). Current regulations require that employment practices with an adverse impact on individuals 40 and over that are defended as based on reasonable factors other than age "can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (2001). And if an employment test has such adverse impact, it must be validated according to the Uniform Guidelines on Employee Selection Procedures *See id.* § 1607 (2001).

has issued rules interpreting it, and Congress has not expressed its intent "unambiguously," the "reviewing court must respect the agency's construction of the statute so long as it is permissible"). *See also Adams,* 255 F.3d at 1328 and n.10 (Barkett, J., concurring).

Also in 1968, Secretary Wirtz' Department of Labor issued several advisory opinions regarding ADEA implementation confirming the view that age-neutral employer practices were subject to the Act. These declared, *inter alia,* that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, 47 AM.U. L. REV. at 1104 and n.204 (citing Charles T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (August 1, 1968) and Ben P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't. of Labor, ADEA Opinion Letter (October 9, 1968)).

Wirtz consistently urged that the ADEA be interpreted broadly, in order to root out unfair and arbitrary treatment of older workers. In 1976 Congressional hearing testimony, former Secretary Wirtz lamented the lack of progress in eliminating barriers to age bias in the workplace and concluded: "there is more reason now, not less, for rigorous enforcement of the ADEA."[12/] The Secretary also expressed expansive views of age discrimination legislation in his 1967 testimony, stating that the purpose of the proposed ADEA was "to get away from arbitrary age distinctions and go to judgment of individuals on their merits;" he wondered "whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is

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[12/] *Impact of the Age Discrimination in Employment Act of 1967, Before the Subcomm. on Retirement Income and Employment, House Select Comm. on Aging*, 94th Cong. 2d Sess. 81 (1976).

that that individual is seeking."[13/] In the 1965 Report, at the outset of his "Conclusions and Recommendations," Wirtz declared:

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

JA 403. Yet, that would be the precise result if the Eleventh Circuit's ruling is affirmed.

B. The Eleventh Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination

The Eleventh Circuit cited two grounds related to legislative history for its affirmance of the district court's conclusion that the ADEA does not permit liability to be established by the disparate impact method of proof. Each is unfounded. First, the court opined that the Wirtz Report differentiated between proof now known as disparate treatment and disparate impact and recommended that Congress only ban the former. Second, the court alleged that the history of the ADEA differs materially from that of Title VII, "which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact."

The *Adams* court's oversimplified rendering of the Wirtz Report ignores numerous instances in which the Report condemns as "arbitrary" and called for the elimination of disparate impacts of neutral employer practices on older workers. As demonstrated *supra* at 12-14, it was clear error to suggest that the Report concluded that "arbitrary

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13/ *Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Pub. Welfare*, 90th Cong. 51-52 (1967). Secretary Wirtz also asserted that the labor market was "putting more and more people with more and more competence and capacity out to pasture earlier and earlier."

discrimination" corresponds only with "disparate treatment based on stereotypical perceptions of the elderly," or that all other "factors affecting older workers, such as policies with disparate impact, should be addressed in alternative ways." 255 F.3d at 1325. Rather, the Report mapped out a more complex taxonomy of age discrimination, in which some "arbitrary" age bias is explicit, but some is founded on actions of an "unthinking majority," JA 358, and still more is premised on unjustifiable – but age-neutral – reliance on tests, physical and educational criteria and other factors unrelated to a worker's productivity or ability to do the job in question. Thus, in the Secretary's view, some policies that have what we now call "disparate impact," amounted to arbitrary bias and constituted an appropriate target for legal liability.

The *Adams* court also endorsed a superficial analysis of the Wirtz Report in *Ellis*. The *Ellis* court asserted, without explanation that "arbitrary discrimination" equals intentional bias and all factors affecting "older workers more strongly as a group" equals disparate impact. *See Ellis*, 73 F.3d at 1008 (citing Wirtz Report at 5, 11) *See* JA 361-62, 378. Hence, neither *Ellis* nor *Adams* reflects an accurate reading of the Report; any review of the Secretary's background "Research Materials;" any consideration of Wirtz' 1967 Senate testimony (or any other legislative records of Congress' original enactment of the ADEA); any analysis of the 1968 interpretive regulations – also penned by Secretary Wirtz; or of the 1968 advisory opinions issued by Wirtz' Labor Department. Surely some greater effort was necessary to justify the *Adams* court's cavalier use of terms invented years after the ADEA's enactment in 1967 – "disparate treatment" and "disparate impact" – to interpret a report issued in 1965.

The *Adams* court compounded its error by characterizing as alien to the Wirtz Report, and thus to the legislative history of the ADEA, a key aspect of Congress' work in enacting Title VII: attention to whether a challenged job requirement had "'a manifest relationship to the employment in question.'" 255 F.3d at 1325-26 (quoting *Griggs*, 401 U.S. at 432). Yet the very same concern drove Secretary Wirtz to catalogue various harms to older workers, including some due to neutral

employer practices, and to condemn all those he deemed "arbitrary," precisely because they had no basis in "ability to do a job." JA 355. Hence, the legislative records of both Title VII and the ADEA support reliance on the disparate impact method of proof.

Finally, regardless how one reads the legislative history, the prohibitions in § 4 of the ADEA, 29 U.S.C. § 623, do not contain the word "arbitrary." Instead, the prohibitory language mirrors that of Title VII. Consequently, the specific prohibitory language of § 4 trumps any contrary inference that may arise from the legislative history or in language in the findings and purpose section of the statute. *See Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973); *Samuels v. Dist. of Columbia*, 650 F. Supp. 482, 484 (D.D.C. 1986).

III. THE COURT HAS RECOGNIZED THAT DISPARATE IMPACT IS MORE EFFECTIVE THAN DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION.

In *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that the disparate impact theory of proof is necessary to combat "the problem of subconscious stereotypes and prejudices," 487 U.S. 977, 990 (1988), because they cannot be "adequately policed through disparate treatment analysis."[14/] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co.*, 507 U.S. at

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[14/] *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act since discrimination against the handicapped results from thoughtlessness not animus) (emphasis added).

610[15/] the disparate impact theory must be available to attack the serious problem of age discrimination in the work place.[16/]

Much of the confusion appears to arise from the Court's comment in *Hazen Paper* that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," 507 U.S. at 610. Based on that language, which was not central to the decision, several courts have wrongly inferred that "the ADEA only prohibits intentional discrimination." *Ellis*, 73 F.3d at 1008. *See also Mullin*, 164 F.3d at 701("the inescapable implication of [Justice O'Connor's] statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA."). These courts erred in taking such a giant leap from dictum on the nature of age discrimination.

First, while there can be no question that *one* of the reasons Congress enacted the ADEA was to combat discrimination based on "stereotypes unsupported by objective fact," *EEOC v. Wyoming*, 460 U.S. at 231, there is no basis in either the

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[15/] In *EEOC v. Wyoming*, the Court also recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes." 460 U.S. at 231; *see* JA 368-71. The Report elaborated that explicit age limits often were defended on age-neutral grounds, which non-age-based rationales were "undoubtedly believed to be in many cases" the true explanations of age limits. *Id.* 369.

[16/] Judge Cudahy recognized this seemingly obvious contradiction in his dissent from *EEOC v. Francis W. Parker School*: "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes,' . . . This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." 41 F.3d 1073, 1080-81 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) (emphasis in original). *See also* Steven J. Kamenshine, "The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229, 309 (1990) ("[T]he assertion that age discrimination results from unconscious stereotyping arguably cuts in favor of, not against, the application of disparate impact in age cases.").

language or the legislative history of the ADEA to restrict its reach to employment decisions based on stereotypes.[17/] Surely it was not the intent of this Court in *Hazen Paper* to thwart the will of Congress by grafting an additional criterion of proof onto the ADEA, severely curtailing the Act's broad protections.[18/]

[17/] Taken at face value, this Court's comments are corroborated in the legislative record of the ADEA, which featured prominently the seemingly nationwide phenomenon of "persistent and widespread use of age limits in hiring." JA 364-67, 404. Yet the very same can be said of Congress' proceedings in enacting Title VII. That is, "facially-race discriminatory employment practices [were] the primary impetus behind the passage of Title VII in 1964," yet "[o]bviously disparate treatment does not define the limit of Title VII's reach, even though it may 'capture the essence' of Title VII's prohibitions." Fentonmiller, 47 AM.U. L. REV. at 1112; *see* Kamenshine, 42 FLA. L. REV. at 291("in the same way Congress was preoccupied with overt racial policies when it outlawed race discrimination under Title VII"). It follows that Congress' and Secretary Wirtz's attention to "overt age restrictions as the most glaring age-based obstacles," *id.*, should not limit the reach of the ADEA.

[18/] Incredibly, courts have gone even further and required ADEA plaintiffs to produce evidence that the employer's decision was motivated by inaccurate and stigmatizing stereotypes about older workers. *See, e.g., Dilla v. West*, 4 F. Supp. 2d 1130 (M.D. Ala. 1998), *aff'd per curiam*, 179 F.3d 1348 (11th Cir. 1999) (holding that employer did not violate the ADEA when it refused to hire applicants based on their proximity to retirement eligibility because "the mere fact that there exists a perfect correlation, or even a direct link, between age and the factor purportedly relied upon by the employer," *id.* at 1142-43, does not mean the employer impermissibly relied on age given that "age discrimination occurs *only* when 'the problem of inaccurate and stigmatizing stereotypes' about older workers are operative.") *Id.* at 1142 (emphasis added).

A. Stereotyping Is Often Unintentional.

Since actions based on stereotypes are not necessarily intentional,[19/] it is erroneous to conclude that because inaccurate stereotypes are often behind age discrimination the ADEA only prohibits intentional discrimination. Actions based on stereotypes can be, and more often than not are, unintentional, and the disparate impact theory is particularly well-suited to combat discrimination caused by unintentional stereotyping. After all, the premise of the disparate impact theory is that "not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes." *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1080 (J. Cudahy, dissenting). This is especially true of age discrimination. Applying the disparate impact theory to the ADEA is consistent with the research on the nature and causes of ageism.[20/]

[19/] The argument that disparate impact is inappropriate where discrimination is caused by stereotypes, not animus, "jeopardize[s] the availability of disparate impact in gender cases as well because gender discrimination, like age, is based more on paternalistic stereotypes than on malevolence." Kaminshine, 42 FLA. L. REV. at 310 (footnote omitted). For that matter, while "race discrimination is steeped in a history of unparalleled hatred and bigotry . . . race discrimination today is often based on the same kind of stereotypes and group-based assumptions about ability that form the basis of age discrimination." *Id.*

[20/] The term "ageism" was coined by Robert N. Butler, M.D. to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us." Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA 11 (1975). Butler describes ageism as:

> a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender . . . Ageism allows the younger generations to see older people as different from themselves; thus they

(continued...)

> Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent. Age discrimination . . . typically results from employers' ignorance about older workers, rather than active dislike of them. Because of this relatively innocuous nature of ageism, the likelihood is considerable that employers may adopt facially neutral policies without recognizing or caring that these policies may have a disparate impact upon older workers.

Howard Eglit, "The Age Discrimination in Employment Act's Forgotten Affirmative Defense," 66 BOSTON LAW REV. 155, 222 (1986).

Recent research has focused on this unconscious age discrimination, also called "implicit ageism." "'[I]mplicit ageism' is defined as the thoughts, feelings, and behaviors toward elderly people that exist and operate without conscious awareness or control, with the assumption that it forms the basis of most interactions with older individuals." Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within, 41 THE GERONTOLOGIST 578, 578 (Oct. 2001). In a related study, the authors explained:

> Age-related biases . . . may have become so routinized that they may influence social judgments at a level below that at which we consciously ascribe traits to others. Such 'automatic' ageism may be hard to eradicate if it has been incoporated into our implicit personality theories or social schemata and is evoked without awareness on our part.

20/ (...continued)

> subtly cease to identify with their elders as human beings.

Id. at 12.

Charles W. Perdue & Michael B. Gurtman, "Evidence for the Automaticity of Ageism," 26 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 201 (1990). Unconscious ageism is pervasive in our society. "Ageism permeates our culture so thoroughly and conditions our attitudes and perceptions so much that most of us are unaware of most of the ageism in it." Erdman B. Palmore, AGEISM: NEGATIVE AND POSITIVE 98 (2d ed. 1999).

Unconscious discrimination is not unique to age discrimination. Like ageism, "[r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. . . ." Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism," 33 STAN. L. REV. 317, 330 (1987).[21/] However, "[a] survey of implicit ageism found that 95% of the participants had negative views of old people . . . a higher proportion than for implicit racism or sexism." Levy, at 578.

B. Disparate Impact is the Most Effective Tool for Policing Discrimination Based on Stereotypes.

It is well established in Title VII jurisprudence that disparate impact is a valuable tool in ferreting out subtle forms of discrimination. *See, e.g., In re: Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999) ("a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'") (quoting *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977)). Indeed, this Court long ago recognized that disparate impact may serve as an effective method of identifying intentional bias that is well hidden. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer refusal to follow alternative

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21/ *See* Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Chalenges and Cultural Change," 100 YALE L.J. 1731, 1764-68 (1991) for a discussion of studies establishing unconscious sexism.

workplace practice with lesser discriminatory impact is evidence that the challenged practice was merely a "pretext" for discrimination); *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (same).[22/]

The fact that "age discrimination is characterized more by indifference and thoughtless bias than by overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Kamenshine, at 318. "If individuals are not aware that a negative stereotype of age has been automatically triggered by a person's older age, they are likely to attribute their behaviors (e.g., failure to hire. . .), to another factor that better fits their preferred self-images as reasonably fair individuals. Thus, rather than acknowledge that 'I hired a younger person in preference to an older person,' a rationalization, such as the older applicant's personality or training, might be evoked." Levy, at 578. *See also* Perdue, & Gurtman, at 200 ("characterizing the aged as unemployable, unintelligent, and 'naturally' unhealthy may help to rationalize discriminatory practices in employment . . . ."). As one commentator observed with regard to the same phenomenon in the context of race discrimination:

> When racism operates at a conscious level, opposing forces can attempt to prevail upon the rationality and moral sensibility of racism's proponents . . . . But when the discriminator is not aware of his prejudice . . . neither reason nor moral persuasion is likely to succeed. The process defect is all the more intractable, and judicial scrutiny becomes imperative.

22/ *See also Adams*, 255 at 1327 (in *Griggs* "the Supreme Court recognized that although discriminatory intent could be hidden, *even from the decisionmaker himself*, its effects in the workplace could not.") (Barkett, J. concurring) (emphasis added); *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1078 ("Moreover, disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways. ... Ultimately, the EEOC must show that Parker's rationale is pretextual and ... is predicated on some stereotype, conscious or *unconscious*") (emphasis added).

Lawrence, 39 STAN. L. REV. at 349. Disparate impact is just as crucial to combating age discrimination as it is to challenging prejudice based on race, national origin, or sex. "People are more conscious of these latter biases but often are unaware of their age bias. Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." Raymond F. Gregory, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 26-27 (2001).

Those circuits that have precluded the application of disparate impact to ADEA cases "seem to assume that only barriers based on animus create problems. But one can have a 'status quo' based on inaccurate stereotypes that society needs to destroy as much as one can have 'status quo' based on animus that should be swept away." Roberta Sue Alexander, "Comment: The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World," 25 DAYTON L. REV. 75, 94 (1999).

If ADEA claims can be established only through disparate treatment analysis, with the requisite proof of conscious discriminatory purpose, individual discrimination claims will not be able to address the issue of unconscious prejudice and the "essence" of age discrimination will be insulated from challenge. Indeed, if as this Court suggested age discrimination is most often caused by stereotypes, then "a theory that tests only for intentional discrimination necessarily misses its mark much of the time." David Benjamin Oppenheimer, "Negligent Discrimination," 141 U. PENN L. REV. 899, 903-04 (1993). The end result is a "status quo" of age bias based on unconscious stereotyping. Indeed, research on age stereotyping suggests that we have already reached such a "status quo." Such research demonstrates that most individuals harbor specific beliefs about older people, that most of those beliefs are inaccurate, and that the stereotypes have persisted in disadvantaging older persons for decades.[23/] For example,

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23/ J. Levin and W.C. Levin, AGEISM: PREJUDICE AND DISCRIMINATION

(continued...)

research on age stereotyping in employment has consistently found that older employees are almost always treated and rated less favorably than younger employees.[24/]

The claim that older workers do not suffer from "the entrenched effects of past discrimination"[25/] is a flawed basis for discarding disparate impact theory under the ADEA. As this Court itself has recognized, "We have not limited this principle [that some facially neutral employment practices are unlawful even in the absence of discriminatory intent] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination." *Watson*, 487 U.S. at 988.[26/]

[23/] (...continued)
AGAINST THE ELDERLY 70-96 (1980).

[24/] *See, e.g.*, Marc Bendick, Jr., Lauren E. Brown, & Kennington Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers," 10(4) JOURNAL OF AGING & SOCIAL POLICY 5 (1999); Marc Bendick, Jr., Charles W. Jackson, & J. Horacio Romero, "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," 8(4) JOURNAL OF AGING & SOCIAL POLICY 25 (1996); William C. Levin, "Age Stereotyping," 10(1) RESEARCH ON AGING 134 (March 1988); Bruce J. Avolio & Gerald V. Barrett, "Effects of Age Stereotyping in a Simulated Interview," 2 PSYCHOLOGY AND AGING, March 1987, at 56; Benson Rosen & Thomas H. Jerdee, "The Nature of Job-Related Age Stereotypes," 59 JOURNAL OF APPLIED PSYCHOLOGY 511 (1976); Benson Rosen & Thomas H. Jerdee, "Influence of Age Stereotypes on Managerial Decisions," 61 JOURNAL OF APPLIED PSYCHOLOGY 428 (1976).

[25/] *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995).

[26/] *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 339-40 (1977) (height and weight requirements had a disparate impact on women; a decision that had nothing to do with historical discrimination).

The Wirtz Report also provides several answers to the argument that ageism lacks any history of entrenched bias. First, the Report documents a substantial record of "persistent and widespread" discrimination dating back at least to the beginning of the century. JA 374, 404. Second, it describes in detail the reasons why "arbitrary" age bias is entrenched: pervasive irrational employer stereotypes, conscious and unconscious, discounting the capacity of older workers to perform on the job. *Id.* 368-73. Further, the perpetuation rationale fails to account for the fact that Title VII addresses characteristics in such a way as to cover all workers, including whites, males, and other groups that have not been victimized by entrenched, historic patterns of invidious discrimination.

Moreover, whether or not stereotypes are rooted in history is irrelevant to the debilitating effect those stereotypes have on older persons. Although ageism may be primarily a twentieth century phenomenon, stereotypes about older persons are ingrained and commonplace in our society. The perpetuation rationale also loses much of its appeal as time marches on and age discrimination remains a pervasive force in our society. The ADEA was enacted 35 years ago, yet, age discrimination in employment continues to impede the achievement of equality in the work place.[27/] "Like racism and sexism, ageism remains recalcitrant, even if below the surface. But it can be – and has been – churned up from its latent position."[28/]

CONCLUSION

In *McKennon v. Nashville Banner Publishing Co.*, the Court declared that "Congress designed the remedial measures in [the

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[27/] *See, e.g.*, Robert Manor & T. Shawn Taylor, *Age-Bias Complaints Up Sharply Older Workers' Higher Salaries are Big Targets for Employers*, CHICAGO TRIBUNE, July 15, 2001, at C1; Stan Hinden, *Forced to Retire Before You're Ready The Merge-and-Downsize Era's Layoffs Hit Older Workers Especially Hard*, WASH. POST, June 6, 1999, at H01.

[28/] Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention," 503 THE ANNALS 138, 140 (1989).

ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. at 358 quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Without the disparate impact theory to challenge subtle forms of age discrimination, employers will not be encouraged to examine policies which adversely effect older workers, but instead will continue to ignore them so that rather than being eliminated, the last vestiges of age discrimination will likely become entrenched "operat[ing] to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed. *Amici* urge this Court to rule that the disparate impact theory of proof is applicable to the ADEA.

Respectfully submitted,

Laurie A. McCann*
Daniel B. Kohrman
Thomas Osborne
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amici Curiae*
* Counsel of Record

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APPENDIX

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Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is the development of policy standards covering academic freedom, tenure, institutional governance, freedom from discrimination, and other key issues in higher education. *See, e.g., On Discrimination* and *1940 Statement of Principles on Academic Freedom and Tenure,* AAUP Policy Documents & Reports (9th Ed., 2001). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that the unavailability of the disparate impact method of proof under the Age Discrimination in Employment Act (ADEA) would undermine the ability of professors to ensure freedom from age discrimination in the academic workplace.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared as both plaintiff and *amicus curiae* before this Court and other courts throughout the nation in numerous civil rights cases.

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, which is an "umbrella organization" for more than 270 local affiliated community-based organizations (CBOs) and about 33,000 individual associate members. In addition to providing capacity-building assistance to our affiliates and essential information to our

individual associates, NCLR serves as a voice for all Hispanic subgroups in all regions of the country. As a civil rights organization, NCLR is vitally concerned with the maintenance of a strong, vigorous, and active federal civil rights enforcement system. NCLR believes that the proper use of the disparate impact standards is essential to protecting Hispanics, older workers, and other groups covered by Title VII of the Civil Rights Act and other laws prohibiting employment discrimination, from bias in the workplace.

The American Jewish Congress is an organization of American Jews that seeks to protect fundamental constitutional freedoms, particularly the civil rights and liberties of American Jews and all Americans. Since Jews in America are an aging population, the American Jewish Congress is particularly concerned with issues that affect the welfare of older Americans. In this connection it has called attention to such problems as nursing home abuses, problems with Medicare, and issues involving the effectiveness of various state agencies administering laws banning age discrimination; and has filed briefs in this Court in such cases as *Cruzan v. Director, Missouri Department of Health.*

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and minorities in employment.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as amicus curiae in numerous cases involving employment law and civil rights issues.